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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

Debtor.

Case No. BK-S-06-10725-LBR

CHAPTER 11

**USACM LIQUIDATING TRUST'S
MOTION TO ALLOW IN PART
PROOF OF CLAIM NO. 10725-02416
IN THE AMOUNT OF \$521,406.20
BY GERRY TOPP; AND
CERTIFICATE OF SERVICE**

Date of Hearing: October 18, 2011

Time of Hearing: 1:30 p.m.

Estimate Time for Hearing: 10 Minutes

The USACM Liquidating Trust (the "USACM Trust") recently discovered approximately 140 proofs of claim ("POC's") that had not been entered into the database of Sierra Consulting Group, LLC ("Sierra") and, therefore, had not been included in the loan by loan objections filed by the USACM Trust. The POC's contain claims that relate to investments in loans that the USACM Trust has already processed. Accordingly, where appropriate the USACM Trust is processing these remaining POC's on a claim by claim basis.

Pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the USACM Trust requests an order allowing in part Proof of Claim No. 10725-02416 (the "Subject Proof of Claim") by Gerry Topp against USA Commercial

1 Mortgage Company (“USACM”) in the total amount of \$521,406.20.¹ Out of this amount,
 2 the USACM Trust seeks to allow \$45,788.99.

3 Here, the Subject Proof of Claim is based upon investments in multiple loans,
 4 including an investment in the Amesbury Hatters Point Loan. On August 11, 2011, the
 5 USACM Trust filed a Motion to Allow Proofs of Claim Based Upon an Investment in the
 6 Amesbury Hatters Point Loan and a Declaration of Mr. Geoffrey L. Berman (“Berman
 7 Decl.”) [DE 8921]² in support of that Motion. A Copy of the Berman Decl. with the
 8 hearing date redacted and “Exhibit A” omitted³ will be served on Mr. Topp with this
 9 Motion. The Motion is scheduled for hearing on September 30, 2011.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. JURISDICTION**

12 The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157.
 13 Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
 14 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007. The statutory predicates
 15 for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

16 **II. APPLICABLE AUTHORITY**

17 Under the Bankruptcy Code, any Claim for which a proof of claim has been filed
 18 will be allowed unless a party in interest objects. If a party in interest objects to the proof
 19 of claim, the Court, after notice and hearing, shall determine the amount of the Claim and
 20 shall allow the Claim except to the extent that the Claim is “unenforceable against the
 21 debtor . . . under any . . . applicable law for a reason other than because such claim is
 22

23 ¹ In compliance with Nevada LR 3007, a copy of the first page of the Subject Proof of Claim is attached as
 24 **Exhibit A**

25 ² The USACM Trust filed the Berman Decl. [DE 8921] in support of the Amesbury Hatters Point omnibus
 26 objections. The Court will hear those omnibus objections at the omnibus hearing on September 30, 2011.

³ Exhibit A to the Berman Decl. lists the Direct Lenders whose claims were affected by the Amesbury
 Hatters Point omnibus objections. Those Direct Lender claims have no relevance to this motion and,
 therefore, Exhibit A to the Burr Decl. will not be provided to Mr. Topp.

contingent or unmatured.” 11 U.S.C. § 502(b). A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996).

III. BACKGROUND FACTS

a. The USACM Bankruptcy

On April 13, 2006 (“Petition Date”), USACM filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtor’s post-petition management of the Debtor was under the direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC, who served as the Chief Restructuring Officer.

USACM was a Nevada corporation that, prior to the Petition Date, was in the business of underwriting, originating, brokering, funding and servicing commercial loans primarily secured by real estate, both on behalf of investors and for its own account. That business included the solicitation of investors to purchase fractional interest in loans that USACM originated and then serviced. These investors are referred to as “Direct Lenders” in USACM’s bankruptcy case and in this Motion.

On January 8, 2007, this Court entered its Order Confirming the “Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No. 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this Court, USACM sold the servicing rights to most of the loans it serviced to Compass Partners, LLC and Compass Financial Partners, LLC (“Compass”). The sale to Compass closed on February 16, 2007.

1 The USACM Trust exists as of the Effective Date of the Plan, which was March 12,
2 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the
3 successor to USACM with respect to standing to seek allowance and disallowance of
4 Claims under 11 U.S.C. § 502(a).

5 **b. The Amesbury Loan**

6 USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding
7 for an acquisition and development loan to a borrower identified as “Amesburyport
8 Corporation.” A copy of the Offer Sheet is attached hereto as **Exhibit B** and incorporated
9 by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was \$21,750,000.
10 *Id.* The Offer Sheet described the investment as a “First Trust Deed Investment” and
11 noted that the investment would be secured by a “First Mortgage on buildings 1 through 9
12 at ‘Hatter Point’ in Amesbury, Massachusetts.” *Id.* The Offer Sheet stated that the loan
13 proceeds would be used to “refinance the existing construction loan and provide
14 construction funds to complete the balance of the project,” which was described as the
15 restoration of nine historic brick mill buildings for conversion in to condominiums. *Id.*
16 The Offer Sheet stated that the loan-to-value was approximately 75% based on “revolver
17 fundings of \$15 million to reach an appraised ‘aggregate retail sell-out’ of \$48,900,000”
18 pursuant to an August 15, 2002 appraisal from Joseph J. Blake and Associates. *Id.*

19 On December 18, 2002, Borrower made and delivered to various lenders, a
20 “Promissory Note (Refinancing and Construction Loan)” (the “Note”) and a Loan
21 Agreement. (Berman Decl., ¶5.) The Loan Agreement provided for a loan of up to
22 \$21,750,000. *Id.* Pursuant to the Loan Agreement, the loan amount was intended for the
23 “refinancing of certain existing debt of the Borrower, and for financing the construction of
24 the Project.” *Id.* The Loan Agreement also provided for a \$5,000,000 “construction
25 revolver” whereby the Borrower could borrow, repay, and then re-borrow \$5,000,000 of
26 the loan. *Id.*

1 The Note was secured by a “Construction Mortgage and Security Agreement” (the
2 “Mortgage”) from Borrower in favor of the Direct Lenders, which was recorded in the
3 official records of the Essex County South District Registry on December 18, 2002 at
4 Instrument 2002121800924. (Berman Decl., ¶ 6.) The Note was also supported by a
5 Guaranty signed by William H. Sullivan on December 18, 2002. (Berman Decl., ¶ 7.)

6 The USACM “Loan Summary” dated July 31, 2006 and filed in this case shows
7 that Borrower was “Non-Performing” on the Note as of July 31, 2006. (Berman
8 Decl., ¶ 8.) During this bankruptcy case through the transfer of servicing to Compass,
9 USACM treated the Direct Lenders with respect to any interim payments by the borrower
10 in accordance with this Court’s orders and the confirmed Plan.

11 Counsel for the Trustee had a brief conversation with a representative of Cross,
12 FLS regarding the status of the Amesbury Loan. According to Cross, FLS, numerous
13 condominium units were completed and sold after USACM provided a partial release.
14 However, the Trust has seen evidence that the funds received from the sale of the units
15 were either not provided to USACM or USACM diverted them back to the Borrower. The
16 result was that those sale proceeds were not used to pay down the Amesbury Loan,
17 although the collateral for the loan was released by USACM. The Guarantor has now
18 passed away. A brief review of the public record shows that numerous partial releases
19 were granted to USACM. Cross is no longer going to service this loan because it
20 considers there to be no chance of recovery.

21 **IV. THE MOTION TO ALLOW**

22 The Direct Lenders received the first position interest in the collateral securing the
23 loan as promised by the Offer Sheet. In addition, the Direct Lenders took a known risk by
24 investing in a promissory note secured by a lien on real property. USACM is not liable for
25 the Borrower’s default or any decrease in the value of the collateral.
26

Nonetheless, the Trust believes USACM failed to fulfill its duties as a servicer to the Direct Lenders in this loan. USACM apparently granted partial releases of numerous individual condominium units without receiving consideration in return for the release or, possibly allowing the Borrower to retain the proceeds thereby denying the direct lenders their share of those proceeds. Thus, USACM released the collateral supporting the direct lender investments and securing the Amesbury Loan without receiving anything of value in return. It appears that the Direct Lenders who invested in the Amesbury Claim have suffered a total loss that was caused, at least in large part, by USACM's misdeeds.

V. CONCLUSION

Based on the foregoing, the USACM Trust respectfully requests that the Court allow in part Proof of Claim No. 10725-02416 filed by Gerry Topp to the extent that claim relates to an investment in the Amesbury Hatters Point Loan; more specifically, out of a total claim in the amount of \$521,406.20, the Court should allow a general unsecured claim in the amount of \$45,788.99. This motion does not relate to or impact the subject Proof of Claim to the extent that it is based upon an investment in a different loan(s). The USACM Trust also requests such other and further relief as is just and proper.

DATED this 20th day of September, 2011.

LEWIS AND ROCA LLP

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1 Copy of the foregoing and supporting
2 declaration of Geoffrey L. Berman
3 [DE 8921] with hearing date
4 redacted and Exhibit A omitted mailed by first class
5 postage prepaid on September 20, 2011 to:

6 Gerry Topp
7 P.O. Box 3008
8 Grass Valley, CA 95945-3008

9 LEWIS AND ROCA LLP

10 /s/Renee L. Creswell
11 Renee L. Creswell
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